No. 22593

In the

United States Court of Appeals

For the Ninth Circuit

EDGAR HERBERT VICKERY,	*Appellant,*
vs.	
FISHER GOVERNOR COMPANY,	*Appellee.*

Brief for Appellant

On Appeal From the United States District Court
for the Northern District of California

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

STATUTES

TEXTS

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Jurisdictional Statement

This is an appeal (i) from an Order Granting Motion For Summary Judgment in favor of Appellee (hereafter called "Fisher") made by the United States District Court for the Northern District of California and the judgment entered thereon on August 14, 1967 (R. 390) and (ii) from an Order (R. 482) of the same Court entered on December 18, 1967, denying the motions of Appellant (hereafter called "Vickery") (a) to set aside the Order Granting Motion For Summary Judgment and the judgment entered thereon and to grant Vickery a new trial pursuant to Rule 59(a), Federal Rules of Civil Procedure (hereafter F.R.C.P.), (b)

to vacate the Order Granting Motion for Summary Judgment and the judgment entered thereon, pursuant to Rule 59(e) F.R.C.P., and (c) for leave, pursuant to Rule 15(a), F.R.C.P., to amend Vickery's First Amended Complaint for Damages to add a second cause of action thereto for reformation of the agreements referred to therein.

Jurisdiction of the District Court was based on diversity of citizenship and the amount in controversy. 28 U.S.C. 1332 (a). Vickery is a citizen of the State of California. Fisher is a corporation incorporated under the laws of the State of Iowa and has its principal place of business in the State of Iowa. The matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars. Those jurisdictional allegations are in Vickery's Complaint For Declaratory and Other Relief (R. 1) and First Amended Complaint For Damages (R. 153) and are admitted in Fisher's Answer to Complaint (R. 36) and Answer to First Amended Complaint and Counterclaim (R. 160).

The District Court's Order Granting Motion for Summary Judgment (R. 390) contains the express determination that there is no just reason for delay and the express direction that judgment be entered (R. 391), specified in Rule 54(b), F.R.C.P. Accordingly, this Court's jurisdiction is conferred by 28 U.S.C. 1291.

STATEMENT OF THE CASE

By his First Amended Complaint For Damages (R. 153), Vickery sought damages from Fisher in the District Court in the amount of $1,131,376 for the breach of two agreements and for the breach of the fiduciary and confidential obligations of Fisher to Vickery imposed by these agreements, plus punitive damages in the amount of $200,000. Both agreements are attached to the original complaint (R. 7-

35) and are incorporated by reference in the amended complaint (R. 154). One of the agreements, referred to in the amended complaint and herein as the "Royalty Agreement", is set forth in full (less Schedule "A" thereto) in Appendix "A" to this brief; the other agreement, referred to in the amended complaint and herein as the "Sales Agreement", is set forth in full in Appendix "B" to this brief.

The breach alleged is Fisher's termination of the Royalty Agreement pursuant to Paragraph 6 thereof, which termination also terminated the Sales Agreement by virtue of the provision of Paragraph 7 thereof (R. 156), and Fisher's continued manufacture and sale of the products covered by those agreements without payment to Vickery of the royalties and commissions specified therein (R. 156-157).

Approximately one year after the original complaint was filed, Fisher filed a Notice of Motion and Motion for Summary Judgment (R. 170) made ". . . on the ground that as a matter of law Defendant had an unrestricted right to terminate the contract which Plaintiff alleges was breached by reason of Defendant's notice of termination and there is accordingly no genuine issue as to any material fact." (R. 170, lines 25-29) Vickery filed an extensive Memorandum of Points and Authorities In Opposition To Motion For Summary Judgment (R. 178-264), including various declarations and documentary evidence in support of the allegations in the amended complaint, to which reference will be made below. The motion was argued before Judge Albert C. Wollenberg and by Order, dated November 18, 1966, (R. 296) the motion was denied.

Thereafter, the case was ordered for trial on July 19, 1967 before Judge Carl A. Muecke (R. 505), specially assigned from the United States District Court for the District of Arizona. On the day set for the trial, Judge Muecke soli-

cited a renewal of Fisher's motion for summary judgment (T. 59, lines 23-25) and granted it on the ground that Fisher's termination of the agreements was not a breach thereof (T. 72, line 22—T. 23, line 4) or of any fiduciary obligation of Fisher to Vickery (T. 76, lines 16-20).

The admitted and disputed facts and circumstances surrounding the negotiations of the Royalty and Sales Agreements, the performance by the parties thereunder and the termination thereof are as follows:

During the period from 1955 through the fall of 1960, Vickery developed, had manufactured for him and sold a line of quality ball valves with superior performance characteristics, principally to firms in the missile and aerospace industry. The selling prices of these valves ranged from $2,000 to $32,700 each. Prior to his association with Fisher, Vickery's sales of these valves amounted to $889,633.91. The designs of these valves are covered by the patent applications and engineering drawings described in the Royalty Agreement. Vickery estimated that he invested $115,801.23 of his own funds in the foregoing program (Vickery declaration, R. 226, line 23—R. 227, line 7).

During the latter part of 1960, Vickery and Fisher commenced negotiations which culminated in the contemporaneous execution of the Royalty and Sales Agreements. At the outset of these negotiations, Vickery disclosed his patent applications and valve designs to Fisher on a confidential basis (R. 193, lines 4-9). In general, the Royalty Agreement (Appendix "A") covered the sale by Vickery to Fisher of Vickery's interest in five applications for United States Letters Patent, certain engineering drawings and miscellaneous personal property, all of which related to ball valves previously developed and sold by Vickery, for a cash payment of $100,000 (paragraph 2.3) and a royalty on sales

over a period of ten years, subject to earlier termination by Fisher (paragraph 3). The Royalty Agreement also covered the initiation and maintenance by Fisher of an aggressive development, engineering, manufacturing and sales programs for the ball valves covered by the agreement (paragraph 4). In general, the Sales Agreement (Appendix "B") covered the grant by Fisher to Vickery of the exclusive right to sell and service products covered by the Royalty Agreement to government end-users in the United States of America for a term of ten years for the commissions specified therein. The Sales Agreement provides (paragraph 7) that the termination of the Royalty Agreement would automatically terminate the Sales Agreement.

The subject of Fisher's right to terminate the Royalty and Sales Agreements prior to the expiration of the ten year term was thoroughly covered during the negotiations. In the Declaration of Alice Vickery (R. 253-255) and in the Declaration of Edgar Herbert Vickery (R. 226, lines 19-22), filed in opposition to Fisher's initial Motion for Summary Judgment (as to which Fisher filed no counter-affidavits or declarations), they state that this point was discussed by them at Fisher's office in Marshalltown, Iowa, with Mr. William Fisher, the president of Fisher, Mr. Paul Elfers, Mr. Kenneth Wolfe and Mr. Ray Engel, Fisher's Vice-Presidents, Mr. Cecil Johnson, Fisher's director of engineering, and Mr. H. R. Ponder, Fisher's treasurer. During the course of the discussion, it was agreed that the term of the agreements was to be for ten years, subject to termination at any time by Fisher. If Fisher terminated the agreements during the first five years of the term, all of the patent applications, designs and property which Vickery was to sell to Fisher would be returned to Vickery and Fisher would discontinue the sale of ball valves. If Fisher termi-

nated during the second five years of the term, Fisher would retain all of the patent applications, designs and property. Messrs. Fisher, Wolfe and Elfers all stated, however, that the only reason Fisher would terminate the agreements would be if Fisher could not sell the ball valves at a profit. Mr. Fisher explained that he was sure that if Fisher carried on a development, production and sales program for five years, Fisher would not want to give up ownership of the patent applications and designs even if Fisher did not intend to continue to manufacture and sell the ball valves covered thereby. Vickery discussed this point again with Messrs. Fisher, Wolfe and Elfers the following day and each of them assured Vickery that Fisher always dealt in good faith and that Fisher would not terminate the agreements unless Fisher determined that it could not manufacture and sell ball valves at a profit.

In his deposition (page 48, line 14—page 50, line 2; page 50, line 22—page 51, line 13), Mr. Fisher admitted that such assurances were given, but he claims that he stated that Fisher also would have the right to terminate the agreements if Vickery failed to communicate ideas to Fisher on a continuing basis. In his deposition (page 15, line 10—page 16, line 5), Mr. Wolfe also admits that such assurances were given but he "can't recall" if any other reasons were expressed to Vickery. Mr. Elfer's deposition was not taken. Mr. Ponder testified in his deposition (page 5, line 19—page 7, line 15; page 20, line 2—page 24, line 4) that the only reason he heard expressed by any Fisher representative to Vickery as the basis for the exercise of Fisher's right to terminate the agreements was the possibility that Fisher could not manufacture and sell the products covered thereby at a profit.

On the basis of the assurances of these men, who the Vickerys knew were the major shareholders of Fisher and its principal officers and directors, the Vickerys ultimately executed the Royalty and Sales Agreements (Declaration of Alice Vickery (R. 255, lines 6-9) and Declaration of Edgar Herbert Vickery (R. 226, lines 19-22)).

Fisher's opinion of the valve designs which it had purchased from Vickery is set forth in the President's message to Fisher's stockholders in its 1960 Annual Report (R. 193), as follows:

> "Negotiations were completed in the Fall to purchase a Ball Valve company on the West Coast. Since no factory properties or facilities were involved, the move to our Midwest location was relatively simple. The Vickery Ball Valve designs are the finest we have seen. The expansion of the Vickery concepts of design for applications at missile bases is now under full swing.
>
> We have recently accepted our first orders for these sophisticated designs which must be submitted to complicated and unique tests before they will be released. The knowledge gained from such tests, coupled with our widespread experience in automatic control valves should provide an enviable position for your company."

After the execution of the Royalty and Sales Agreements, Vickery moved from his home in Oakland, California, to Marshalltown, Iowa, the site of Fisher's plant. There he worked with Fisher's personnel on the implementation of the ball valve program almost exclusively for approximately three and one-half years during the developmental phases of the program. Thereafter, he returned to California to concentrate for the next approximate year and one-half more exclusively on the sale of the products which had been developed (Vickery's declaration R. 227, lines 8-15).

During the course of Vickery's performance under the agreements, he worked initially in the development of what ultimately became known as the "Fisher-Vickery Ball Valve" and, thereafter, in the development of what ultimately became known as the "Hi-Ball Valve" (Vickery's declaration R. 227, lines 15-23). Vickery also re-designed the sealing mechanism for a valve which Fisher had commenced developing prior to Vickery's association with Fisher and which ultimately became known as the "Vee-Ball Valve" (Vickery's declaration R. 228, line 16 — R. 229, line 5). Vickery also invented a type of valve known as a "Cam-Ball valve" (Vickery's declaration R. 229, lines 17-21).

During the first five years of the term of the Royalty Agreement, the five patent applications referred to therein matured into six United States Letters Patent which issued in Fisher's name as assignee (R. 328, lines 17-22).

In the Declaration of Marcus Lothrop, Esq., Vickery's patent attorney, filed in opposition to Fisher's initial motion for summary judgment, he states that it is his opinion that one of those patents covers the "Fisher-Vickery Ball Valve", the "Hi-Ball Valve" and the "Vee-Ball Valve", with the exception of a certain model thereof which has no tight sealing means (R. 262-263). Fisher did not file a counter-affidavit or declaration to this declaration.

In Paragraph V of his amended complaint (R. 155), Vickery alleges that during the period from January 1, 1961 through December 31, 1965 (the first five years of the ten year term of the Royalty and Sales Agreement expired on October 1, 1965), Fisher's sales of products covered by those agreements within Vickery's exclusive territory under the Sales Agreement alone amounted to $3,666,483, on which Fisher paid Vickery commissions in the amount of $523,083. In Paragraph V of Fisher's answer (R. 161), Fisher admits

that these sales amounted to $3,465,505 and that Fisher paid Vickery commissions thereon of $515,805. Fisher claims that it does not have records of profits on all of these sales, but, with respect to the sales on which it admits it has profit records, Fisher made a pre-tax profit of $336,469.72 on the $2,533,992 sale price thereof (R. 256-257).

In addition to the foregoing sales of between $3,666,483 and $3,465,505 made by Fisher during the first five years of the term of the agreements, Fisher also admits the following sales during the same period of products which Vickery claims are covered by the Royalty Agreement (R. 328, line 30 — R. 329, line 12):

1963	
"Vee-Ball"*	$ 377,063
1964	
V-24 (predecessor of "Hi-Ball")⁑	6,525
"Vee-Ball"*	537,991
1965	
"Vee-Ball"*	1,709,774
V-24 and V-25 (V-25 is "Hi-Ball")⁑	17,830
Total	$2,649,183

*Includes valve bodies and actuators and valves with and without seals.
⁑Includes valve bodies and actuators.

Mr. Glenn Brockett, Fisher's Vice-President of Sales, testified in his deposition (page 18, line 19—page 19, line 2; and page 24, lines 1-5) that Fisher expected to make a pre-tax profit of at least 20% on "Vee-Ball" and "Hi-Ball" sales. This would amount to approximately $529,836.

In addition, projections of the sales of products which Vickery contends are covered by the Royalty and Sales Agreements from January 1, 1966 (the effective date of Fisher's notice of termination was December 2, 1965) through December 31, 1970 (the ten year term of the Royalty and Sales Agreements would have expired on October 1, 1970) which were made by Fisher personnel at

or about the date of the notice of termination, or communicated by Vickery to Fisher prior to that date, are as follows:

"Vee-Ball Valve"	$49,200,000
"Hi-Ball Valve"	9,135,000
"Fisher-Vickery Ball Valve"	4,000,000
"Cam-Ball Valve"	1,875,000
	$64,210,000

The projection of the "Vee-Ball Valve" sales is Exhibit B-3 to Mr. Brockett's deposition and he testified with respect thereto at page 12, line 10 — page 23, line 2. The projection of the "Hi-Ball Valve" sales is Exhibit B-4 to Mr. Brockett's deposition and he testified with respect thereto at page 23, line 3—page 24, line 10. The projection of the "Fisher-Vickery" and "Cam-Ball" sales are in Vickery's declaration (R. 229, line 17—R. 230, line 3).

Fisher's notice of termination (R. 35) was given on October 2, 1965. Paragraph 7 of the Royalty Agreement (Appendix "A") provides, in substance, that if Fisher exercises the right of termination prior to October 1, 1965 (one day prior to the date of the notice of termination), Fisher shall be obligated to transfer to Vickery all personal property and designs, patent applications and patents received from Vickery, and to cease the production and sale of products covered by the Royalty Agreement. Under Paragraph 3 of the Royalty Agreement, Fisher's obligation to pay minimum royalties to Vickery ceased on October 1, 1965. Accordingly, from October 1, 1965 to the end of the ten year term (October 1, 1970), Fisher would be obligated to pay royalties to Vickery under the Royalty Agreement (Paragraph 3 of Appendix "A") only to the extent that the annual sales of the products covered thereby exceeded $500,000. Under the Sales Agreement (Appendix "B"), Fisher had no obligation to pay commissions to Vickery

unless Vickery sold products covered thereby within his exclusive territory.

Vickery was not informed that Fisher intended to terminate the Royalty and Sales Agreements until he received the notice of termination, although he was at Fisher's plant in Marshalltown in September, 1965, after the decision to terminate had been made (Vickery's declaration R. 230, lines 10-14). Mr. Brockett, Fisher's Vice-President of Sales, testified in his deposition in this regard (page 38, line 19—page 39, line 6) as follows:

> "Q. You have testified that you saw Mr. Vickery in Marshalltown in September of 1965 or the Fall of 1965?
> A. Yes.
> Q. Before the contract was cancelled.
> A. Yes.
> Q. Did you tell him at that time that the contract was going to be cancelled?
> A. No, sir.
> Q. Why not?
> A. He didn't ask me.
> Q. Well, don't you think in all fairness this would be a subject that you should bring up?
> A. No, sir."

At no time from the date Vickery signed the Royalty and Sales Agreements until he received the termination letter did anyone associated with Fisher complain, state or otherwise remark that the services Vickery was performing under those agreements were, in any manner, unsatisfactory (Vickery declaration R. 230, lines 4-9). In their depositions, Mr. Fisher testified that he made no such complaints (page 94, line 21—page 95, line 4), Mr. Engle, Fisher's Vice-President of Engineering, didn't recall any complaints (page 27, lines 17-19; page 29, lines 5-10) and

Mr. Johnson, Fisher's Director of Engineering, had no complaints (page 8, line 21—page 9, line 4).

The reasons why Fisher purported to terminate the Royalty and Sales Agreements were given by Messrs. Fisher and Brockett in their depositions taken approximately four months after the date of the letter of termination. Mr. Fisher testified that the decision to terminate the agreements was made at approximately the date of letter (October 2, 1965). Mr. Brockett testified that the decision to terminate was made in late July, 1965. The reasons given are vague, evasive, conflicting and insubstantial. Their testimony in this regard is set forth in full in Appendix C and Appendix D, respectively.

Neither Mr. Engle, Fisher's Vice-President of Engineering, nor Mr. Johnson, Fisher's Director of Engineering, was consulted about the advisability of exercising the right to terminate the Royalty and Sales Agreements and they were not advised that it had been exercised until some months thereafter. (Engle deposition page 29, line 11—page 30, line 7 and Johnson deposition page 10, lines 6-16).

On October 19, 1965, twelve days after the letter of termination was sent, Mr. Brockett wrote the following letter to Vickery (R. 264):

> "Dear Herb:
>
> When I arrived home from Los Angeles, I found on my desk a copy of the letter from our attorney canceling your contract. I find that this was done as a result of instructions from Bill Fisher and Millard Gelvin. I did know that such a cancellation was under consideration, but I did not know that it was quite so imminent.
>
> The real purpose of this letter is to advise you that as far as we are concerned, the cancelation of the contract will only affect the royalties and not our sales agreements. We will continue to accept orders from you and pay you the same commissions as in the past. Conse-

quently, I see no real reason for any fundamental change in our relationship."

Vickery did not respond to this letter.

SPECIFICATION OF ERRORS RELIED ON

1. The District Court erred in granting Fisher's renewed motion for summary judgment.

2. The District Court erred in denying Vickery's motions to set aside and to vacate the Order Granting Motion For Summary Judgment.

3. The District Court erred in denying Vickery's motion for leave to file an amended complaint to add a second cause of action thereto for reformation of the Royalty and Sales Agreements.

QUESTIONS PRESENTED

1. Whether a renewed motion for summary judgment (previously denied by another judge), which determined as a matter of law that a right to terminate certain agreements imposing a fiduciary and confidential relationship on the parties was exercised without liability, was properly granted on the day of trial (and motions to vacate and set the same aside were properly denied), when there were genuine factual issues as to the bad faith and lack of justification on the part of, and resulting benefit to, the terminating party and as to the resulting detriment to the terminated party.

2. Whether, regardless of the existence of a fiduciary and confidential relationship between the parties, a renewed motion for summary judgment (previously denied by another judge), which determined as a matter of law that a right to terminate certain agreements was exercised without liability, was properly granted on the day of trial (and motions to vacate and set the same aside were properly

denied), when there were genuine factual issues as to the bad faith and lack of justification on the part of, and resulting benefit to, the terminating party and as to the resulting detriment to the terminated party.

3. Whether a renewed motion for summary judgment (previously denied by another judge), based on the construction of certain agreements with a ten year term so as to give one party the unilateral option during the last five years of the term to pay or not to pay the specified consideration, was properly granted on the day of trial (and motions to vacate and set the same aside were properly denied).

4. Whether the District Court abused it discretion by denying Vickery's motion for leave to file an amended complaint to add a second cause of action to his First Amended Complaint for Damages for reformation of the Royalty and Sales Agreements, where the proposed amendment pleads essentially the same facts pleaded in the original and first amended complaints, no new discovery will be required and Fisher will not be prejudiced thereby.

APPLICABLE SUBSTANTIVE LAW

The parties agree that the law of the State of Iowa governs all substantive issues in this case (R. 335, lines 25-26).

ARGUMENT

1. The Royalty and Sales Agreement and the acts of the parties in connection therewith resulted in the imposition by law of a fiduciary and confidential relationship on the parties. That relationship obligated each of the parties to act toward the other in the utmost good faith and fair dealing. Fisher's termination of the Royalty and Sales Agreements was in bad faith and without justification, it re-

sulted in an unjust enrichment of Fisher and a material detriment to Vickery and, therefore, was a breach of this law imposed obligation.

1.1 The Fiduciary and Confidential Relationship:

1.11 During the course of the negotiations which culminated in the Royalty and Sales Agreements, Vickery disclosed his patent applications and valve designs to Fisher on a confidential basis (R. 193, lines 4-9). It is apparent from Paragraphs 4 and 5 of the Royalty Agreement and from the Sales Agreement that the parties intended to, and did, work together in a cooperative endeavor to develop, engineer, manufacture and sell ball valves of, or based upon, Vickery's designs. It is further apparent that Fisher gained additional knowledge with respect to Vickery's designs during the five years that Vickery and Fisher worked together in that regard (R. 227, lines 8-27; R. 228, line 16—R. 229, lines 5; R. 229, lines 17-21). The implementation of the whole ball valve program contemplated by the Royalty Agreement, from the developmental phase to the marketing phase, was within the exclusive control of Fisher (Royalty Agreement, paragraphs 4 and 5). Under circumstances such as these, the law imposes a fiduciary and confidential relationship on the parties.

See *Saco-Lowell Shops v. Reynolds* (4th Cir.) 141 F.2d 587 where the court stated at page 597:

> "The liability of defendant here is not to be determined as upon a charge of patent infringement nor even as in the case of an ordinary licensee under contract for the payment of royalties, for the reason that the J frames upon which royalties are claimed embody not only the fundamental ideas embodied in the Reynolds invention but also a specific application of those ideas evolved by Reynolds himself and communicated to defendant because of the confidential relationship

into which the parties had entered for the development of the invention. In other words, defendant is not an independent manufacturer, nor is it a mere licensee manufacturing a machine obtained from an independent source. It is a licensee who was working with Reynolds in the joint enterprise of developing his machine for the market, and who brought out a machine based upon ideas which he conceived and which he communicated in aid of the joint enterprise. There can be no question but that defendant is liable for royalties on the machines embodying Reynolds' idea so communicated, quite irrespective of patent coverage or terms of the license agreement.

That there was a confidential relationship existing between defendant and Reynolds when they agreed to work together for the development and marketing of his invention is so clear as not to admit of argument. Cf. *Baker Oil Tools v. Burch,* 10 Cir., 71 F. 2d 31, 37. As said in the case cited, quoting from the note of Judge Hare in *1 Leading Cases in Equity 62,* 'Wherever one person is placed in such relation to another, by the act or consent of that other . . . that he becomes interested for him, or interested with him in any subject of property or business, he is prohibited from acquiring rights in that subject antagonistic to the person with whose interests he has become associated.' "

And *Stevens v. Marco,* 147 Cal.App.2d 357 (305 P.2d 669) where the court stated at page 373 (of 147 Cal.App. 2d):

". . . Where an inventor entrusts his secret idea or device to another under an arrangement whereby the other party agrees to develop, patent and commercially exploit the idea in return for royalties to be paid the inventor, there arises a confidential or fiduciary relationship between the parties. [citing cases] Indeed, it would be difficult to postulate a relationship more confidential than one in which a secret is imparted to a

person professing to have the ability and facilities to develop, patent, and exploit it upon his promise to give the inventor a return in the form of royalties. In the instant case, the salutary character of such a rule is manifest. Plaintiff transferred to Marco a new and valuable idea and Marco assumed full responsibility for securing a patent. Since the processing of a patent application is secret, plaintiff could learn only what Marco cared to divulge about the progress of the Marco applications, as well as other applications on improvements, and he had of necessity, because of Marco's superior position in this respect, to repose a special confidence in Marco's integrity. In addition, since Marco was in charge of the marketing of the device, plaintiff had also to rely on his business judgment with respect to production, and on his fidelity with respect to keeping and furnishing honest accountings of sales. Here, too, Marco occupied a superior position. There was present, therefore, all the classic elements of a confidential relation, and Marco owed to plaintiff the fiduciary obligations of utmost good faith and fair dealing of one occupying a status akin to that of a trustee. As stated in *Cox v. Schnerr, supra,* 172 Cal. 371, 378, 156 P. 509, 513, 'And this rule [of fiduciary obligation] does not apply merely to those who bear a formal relation of trust to those with whom they deal—not only to attorneys, physicians, trustees, clergymen, kinsmen, and others who by the very force of their occupations or relationship are presumed to be in the class of persons bound to act with the utmost good faith. *It applies in every case "where there has been a confidence reposed which invests the person trusted with an advantage in treating with the person so confiding."* ' " (Emphasis added by the Court).

The Court then went on to point out that there was ample evidence from which the jury might also have found, as a matter of fact, that the parties were allied in an enterprise

similar to that of joint venturers for material gain which also would give rise to a fiduciary relationship.

To the same effect is *Hyde Corporation v. Huffines,* 158 Tex. 566 (314 S.W.2d 763), certiorari denied 358 U.S. 898 (79 S.Ct. 223). In that case, the parties entered into a licensing agreement covering a device on which a patent application had been filed. The term of the agreement was for one year with automatic renewals from year to year thereafter for the pendency of the patent application and for the life of any patent or patents that issued therefrom, subject to certain conditions not relevant to the decision. The agreement also provided "Sixty (60) days' notice to terminate this contract shall be given by Licensee." The Court stated at page 768 (314 S.W.2d):

> "It conclusively appears that as a result of this agreement and the negotiations preceding its execution, Hyde Corporation gained full knowledge of the Huffines device not only from the application for patent but from scale models, blue prints, and actual construction of the device. On May 31, 1955, when the parties were in the second year of operations under the contract, Hyde Corporation repudiated the licensing agreement by giving the sixty-day notice provided for in the contract. However, according to the jury's findings, said defendant did not cease to manufacture the Huffines' device but on the contrary continued to produce the same substantially in accordance with the description of the mechanism contained in Huffines' patent application."

The Court went on to state at pages 769-770 (314 S.W.2d):

> "Petitioner's arguments as to the pleadings and evidence [with respect to the issue of breach of confidence] seem to run counter to the realities of the case as fixed by the written licensing agreement. It is true

that there is no explicit written covenant contained in the contract which precludes petitioner from making use of information granted as a result of contract negotiations and disclosures by Huffines *after* the cancellation of the licensing agreement. It is also true that respondent's pleadings do not use the words 'in confidence' by way of stating a conclusion. The picture presented by the pleadings and the evidence both undisputed and as interpreted by the jury is that of a licensee after contracting with an inventor (in good faith according to the jury's answer to Special Issue No. 2) for the use of an invention upon which an application for patent was pending, repudiating the licensing agreement and insisting upon utilizing the device despite the fact that he secured information which enabled him to manufacture the device through the licensing agreement and the negotiations relating thereto. To say that petitioner did not gain knowledge of the device in this manner is to deny the stated purpose of the licensing agreement. . . . We are not called upon to consider at what period in the course of negotiations petitioner's actions may have ceased to be ethically permissible. We here have business relations culminating in a licensing agreement. The case seems to come squarely within the rule of the American Law Institute's Restatement of the Law that:

> 'One who discloses or uses another's trade secrets, without a privilege to do so, is liable to the other if (a) he discovers the secret by improper means, or (b) his disclosure or use constitutes a breach of confidence reposed in him by the other in disclosing the secret to him. * * *.' 4 Restatement of Torts Section 757.

The jury evidently believed that at the time the licensing agreement was entered into, Hyde Corporation was acting in good faith, but thereafter decided to use the respondent's device without accounting to him. If so, it might be absolved under clause (a) of the rule

but would be held liable under clause (b) thereof. In the present case, the parties occupied the position of licensor and licensee. They were in a sense co-adventurers. There existed between them a confidential relationship as a matter of law and there was no need to submit these incidents of legal status to a jury for its determination. In commenting upon clause (b) of the rule above stated, it is said in the Restatement that:

> 'A breach of confidence under the rule stated in this Clause may also be a breach of contract which subjects the actor to liability under the rules stated in the Restatement of Contracts. But whether or not there is a breach of contract, the rule stated in this Section subjects the actor to liability if his disclosure or use of another's trade secret is a breach of the confidence reposed in him by the other in disclosing the secret to him. The chief example of a confidential relationship under this rule is the relationship of principal and agent (see Restatement of Agency, Sections 395 and 396). Such is also the relationship between partners or other joint adventurers. But this confidence may exist also in other situations. For example, A has a trade secret which he wishes to sell with or without his business. B is a prospective purchaser. In the course of negotiations, A discloses the secret to B solely for the purpose of enabling him to appraise its value. Or, A requests a loan from B, a banker, for the purpose of aiding the manufacture of a product by A's secret process. In order to assure B about the soundness of the loan, A discloses the secret to him in confidence. In both cases B is under a duty not to disclose the secret or use it adversely to A. * * *' 4 Restatement of Torts, Section 757, Comment on Clause (b) p. 13.

While there may be some distinction in the theory of recovery under clauses (a) and (b), that is whether in tort or contract, *Aktiebolaget Befors v. United States*, 90 U.S. App. D.C. 92, 194 F. 2d 145, that point is not involved here. In the area of confidential relationships

> between partners, employers and employees, licensors and licensees, and the like, the injured party is not required to rely upon an express agreement to hold the trade secret in confidence, *Schreyer v. Casco Products Corp.*, 2 Cir., 190 F. 2d 921, *Smith v. Dravo Corporation,* 7 Cir., 203 F. 2d 369, nor should he be deprived of all relief because the offending person may have originally entered into the particular relationship unaffected by a then existing ulterior or improper motive."

The comment of the Restatement upon clause (b) makes it clear that the breach of confidence therein referred to is actionable separate and apart from any breach of contract.

The fact that the relationship in *Hyde* was licensor and licensee whereas here, Vickery assigned his patent applications and designs to Fisher and retained a royalty interest, does not distinguish the cases. See *Milligan v. Lalance & Grosjean Mfg. Co.* (Cir. Ct. N.Y.) 21 F. 570 which was a suit on a contract for royalties due under an assigned patent. There, the Court stated:

> "The relation of the parties in respect to the patent became similar to that of licensor and licensee. The defendant held the legal title to the patent, but held it to use and pay for the use."

The principles expressed in the foregoing cases are followed in:

Baker Oil Tools v. Burch (10th Cir.) 71 F.2d 31, 36

Sloan v. Mud Products, Inc. (N.D. Okla.) 114 F.Supp. 916, 926

Reddi-Wip v. Knapp-Monarch Co. (E.D. Mo.) 104 F.Supp. 204, 209

In *Lukens Steel Co.* v. *American Locomotive Co.* (N.D. N.Y.) 99 F. Supp. 442 the Court expressly rejected the argument that a confidential and fiduciary relationship

cannot arise out of a business relationship between corporations experienced in business affairs. There, Lukens' engineers worked with the engineers of American ("Alco") in a cooperative endeavor to develop a certain type of locomotive. The court described the consequences of that relationship at page 446 as follows:

> "It certainly was not a vendor and purchaser arrangement to which the rule of *caveat emptor* applies. Neither was it the formal relationship which exists between fiduciary and beneficiary, guardian and ward, or principal and agent. It appears in some respects to have some of the elements of a joint venture, but it is sufficient to say that it was a business relationship involving mutual confidence and mutual effort in which each party hoped to profit. Alco's goal was a competitively profitable engine block design. Luken's goal was the future sale of its products. Although this Court can find no enforceable contract whereby Alco agreed to make any definite purchases for any definite time, or under any particular condition, it is readily inferable that Alco expected and intended to purchase at least part of its requirements from Lukens.
>
> The problem next confronting the Court is the determination and application of the law which governs the conduct of the parties in the relationship found above.
>
> Each case depends upon its own facts but speaking generally it may be said that when one reposes confidence in the skill or integrity of another who purports to act for the first party's benefit, then the actor may take no advantage to himself in hostility to the interest of the first party. A confidence reposed and accepted requires an undivided loyalty.
>
> [The Court here quoted the excerpt from *1 Leading Cases in Equity 62* quoted in *Saco-Lowell,* supra, as well as other authorities.]
>
> Plaintiff's argument that the rule does not apply to the business relationship of these two large corpora-

> tions experienced in business affairs is rejected. The fundamental concepts of honesty and fair dealing bind all business relationships in the various degrees required by the position of the parties and the extent of the confidence reposed. Theirs was not the 'arms length' dealing referred to in *Meinhard* v. *Salmon,* 249 N.Y. 458, 164 N.E. 545, 62 A.L.R. 1. The finding that confidence was reposed in Lukens and that both parties were interested in perfecting a suitable engine design makes the rule directly applicable."

Counsel could find no Iowa cases on this point which are factually similar to the case at bar; however, it is clear that Iowa recognizes fiduciary relationships arising from business transactions. See *Winn v. Rudy Patrick Seed Co.* 249 Iowa 431 (86 N.W.2d 678, 680) and *Goss v. Lanin* 170 Iowa 57 (152 N.W. 43, 45-46).

1.2 The Extent of the Obligations Imposed by the Fiduciary and Confidential Relationship:

1.21 The consequences of the fiduciary and confidential relationship between Vickery and Fisher — which are imposed by law independently of the contractual rights and obligations of the parties — are succinctly stated in *Stevens v. Marco, supra,* at page 373 (147 Cal.App.2d):

> "There were present, therefore, all of the classic elements of a confidential relation, and Marco owed to plaintiff the fiduciary obligations of utmost good faith and fair dealing of one occupying a status akin to that of a trustee."

1.22 Applying the foregoing principles to the instant case, it is clear that a confidential and fiduciary relationship existed between Vickery and Fisher. That relationship cast upon each party the law-imposed standard of "utmost good faith and fair dealing." Therefore, the facts and circumstances surrounding Fisher's termination of the Royalty

and Sales Agreements must be considered to determine whether Fisher's conduct met this standard.

1.3 The Following Circumstances Surrounding Fisher's Termination of the Royalty and Sales Agreements, as to Many of Which There are Genuine Factual Issues, Precludes the Granting of Summary Judgment:

1.31 The result of the termination was that Fisher appropriated to itself (i) six United States Letters Patent which were issued on the patent applications assigned by Vickery to Fisher pursuant to the Royalty Agreement (R. 328, lines 17-22), (ii) all of the ball valve and other designs disclosed in the engineering drawings described in Schedule "A" to the Royalty Agreement, (iii) the design of the "Cam-Ball Valve" invented by Vickery and disclosed to Fisher pursuant to the Royalty Agreement (R. 229, lines 17-21), (iv) the seal and other designs of Vickery embodied in the valves now manufactured and sold by Fisher under the trade names "Fisher-Vickery", "Hi-Ball" and "Vee-Ball" (R. 262-263), (v) the knowledge gained by Fisher from Vickery with respect to ball valve design and manufacturing techniques (R. 227, lines 8-27) and (vi) the market for ball valves in the missile and aerospace industry previously developed by Vickery (R. 226, line 23-R. 227, line 7), without paying to Vickery the royalties and commissions provided for over the remaining five years of the ten year term of those agreements.

1.32 Under Paragraph 3 of the Royalty Agreement, Fisher's obligation to pay minimum royalties to Vickery ceased on October 1, 1965 (one day prior to the letter of termination). Accordingly, if Fisher had not exercised the right of termination, Fisher would not have been obligated to pay any royalties whatsoever to Vickery unless Fisher's sales of products covered thereby exceeded $500,000

annually. Similarly, under the Sales Agreement, Fisher had no obligation to pay commissions to Vickery unless he, in fact, made sales of the products covered by the agreements within his exclusive territory. Thus, the purported termination had no other effect than deprive Vickery of his royalties and commissions while permitting Fisher to unjustly enrich itself by enjoying all of the benefits of the agreements without the corresponding obligations.

1.33 During the first five years of the ten year term of the agreements, Fisher's sales of what Vickery contends are products covered thereby were between $6,315,666 and $6,114,688 (R. 161; R. 256-257; R. 328, line 30—R. 329, line 12), and Fisher's profit thereon exceeded $866,305 (R. 256-257; Brockett deposition page 18, line 19—page 19, line 2; page 24, lines 1-5). Fisher terminated the agreements with the knowledge that the sales of what Vickery contends are products covered thereby over the remaining five years of the term of the agreements were projected to be $64,210,000 (Brockett deposition page 12, line 10; page 23, line 2; page 23, line 3—page 24, line 10; Vickery declaration R. 229, line 17—R. 230, line 3).

1.34 Fisher's principal officers represented to Vickery during the contract negotiations that the right to terminate the agreements would be exercised only if Fisher could not manufacture and sell the products covered thereby at a profit (Declaration of Alice Vickery R. 253-255; declaration of Vickery R. 226, lines 19-22; Fisher deposition page 48, line 14—page 50, line 2; Page 50, line 22—Page 51, line 13; Wolfe deposition page 15, line 10—page 16, line 5; Ponder deposition page 5, line 19—Page 7, line 15; page 20, line 2—page 24, line 4).

1.35 Fisher regarded Vickery's ball valve designs as "the finest we have seen" and so stated in its 1960 annual report to its shareholders (R. 193).

1.36 Fisher did not inform Vickery that Fisher intended to terminate the agreements, although Vickery was in Fisher's offices after the decision to terminate had been made, at least according to the testimony of Mr. Brockett, Appendix D, (Vickery declaration R. 230, lines 10-14).

1.37 The reasons given by Mr. Fisher (Appendix C) and Mr. Brockett (Appendix D) for the decision to terminate the agreements are vague, evasive and contradictory. Among the reasons given were:

(a) Declining sales. In this regard, see Paragraph 1.33, supra.

(b) Lack or participation in and contribution to, the ball valve program by Vickery. But at no time prior to the termination did Fisher inform Vickery that any aspect of his ball valve designs or any respect of his performance under the agreements was unsatisfactory (Vickery declaration R. 230, lines 4-9; Fisher deposition page 94, line 24—Page 95, line 4; Engle deposition page 27, lines 17-19; page 29, lines 5-10; Johnson deposition page 8, line 21—page 9, line 4). Similarly, neither Mr. Engle nor Mr. Johnson, Fisher's Vice-President of Engineering and Director of Engineering respectively, who obviously would be most knowledgeable about Vickery's contributions to the program, were consulted about the advisability of exercising the right to terminate the agreements, nor were either of them advised that it had been exercised until some months after the event (Engle deposition page 29, line 11—page 30, line 7; Johnson deposition page 10, lines 6-16).

1.38 Fisher exercised the right of termination (R. 35) one day after October 1, 1965. If the right had been exercised by Fisher at any time prior to that date, Fisher would have been expressly obligated under Paragraph 7 of the Royalty Agreement to transfer to Vickery all personal property, designs, patent applications and patents received

from Vickery and to cease the production and sale of products covered by the Royalty Agreement.

1.39 Promptly after Fisher exercised the right of termination, Fisher offered to continue the Sales Agreement in effect (R. 264). Thus, it is apparent that the motivation for Fisher's exercise of the right of termination was to relieve itself of the obligation to pay royalties on the products developed from Vickery's designs on the enormous sales thereof which were projected for the remaining five years of the term of the Royalty Agreement. (Paragraph 1.33, supra)

1.4 The foregoing factual issues preclude the granting of a motion for summary judgment.

2. Fisher's termination of the Royalty and Sales Agreement was in bad faith and without justification, it resulted in an unjust enrichment of Fisher and a material detriment to Vickery and, therefore, was a breach of those agreements, regardless of the fiduciary and confidential relationship between the parties.

2.1 *Philadelphia Storage Battery Co. v. Mutual Tire Stores,* 161 So.Car. 487 (159 S.E. 825) is the leading case for the proposition that the exercise in bad faith and without reasonable cause of an option to terminate an agreement with a fixed term is a breach of that agreement. In that case, the agreement was between a manufacturer and a jobber for a term of one year, terminable at any time by either party by written notice to the other. In the middle of the term and without prior notice, the manufacturer exercised the option. The manufacturer then sued the jobber for certain goods sold to the jobber. The jobber answered alleging that the manufacturer had cancelled the agreement pursuant to a fraudulent scheme to supplant him with another jobber, all in breach of the agreement. The manufacturer demurred to the answer on

the ground (as claimed by Fisher herein) that it had done nothing it was not authorized to do by the terms of the agreement. The demurrer was overruled and, on appeal from that ruling, the Supreme Court affirmed, stating in part:

> "The clause relating to the right of cancellation of jobber's agreement . . . is clear cut in its terms and free from ambiguity. It is enforceable if it be not against equity and good conscience. It would seem to be a necessary corollary that it may not be terminated, if the manner of its termination be against equity and good conscience."

That case was followed in *Harrison & Sons, Inc. v. J. I. Case Co.* (E.D. So.Car.) 180 F.Supp. 243 and cited with approval in *Bernecker v. Bernecker,* Fla., 1952 (60 So. 2d 399).

Audi Vision Inc. v. RCA Mfg. Co. (2nd Cir.) 136 F.2d 621, involved the cancellation of an agreement which provided that it could be cancelled by one party "on written notice at any time". The District Court granted a motion for summary judgment on this point in favor of the defendant and the plaintiff appealed. The Court of Appeals stated at page 622:

> "On this appeal plaintiffs . . . contest the district court's conclusion that defendant's privilege of cancellation was unrestricted and that their allegations of defendant's taking Audi Vision's general manager into its employ, in order to get the benefits of the contract notwithstanding the cancellation, did not present any issue of fact."

After concluding that it did not have jurisdiction to hear the appeal (for reasons which since have been corrected by amendments to Rule 54(b), F.R.C.P.) the Court stated at page 624:

> ". . . In fact in the light of our necessary conclusion that the ruling heretofore made has been provisional only, the district court may well conclude hereafter upon further reflection that compliance with the cancellation provision may depend in part upon matters of fact as asserted by the parties, rather than exclusively upon the conclusion of law which it has heretofore made. Cf. 4 *Williston on Contracts,* Rev. Ed., Section 1027A; Restatement, Agency, Section 454; *White Co. v. W. P. Farley & Co.,* 219 Ky. 66, 292 S.W. 472, 52 A.L.R. 541; *Philadelphia Storage Battery Co. v Mutual Tire Stores,* 161 S.C. 487, 159 S.E. 825; 17 Corn.L.Q. 479; 45 Harv.L.Rev. 378."

The concurring judge stated at page 626:

> "As stated in the foregoing opinion, we have no jurisdiction to consider the merits of the appeal. Yet the opinion, although obliquely, in part suggests our views on the merits, for it broadly hints that the trial court should modify at least some of the rulings from which plaintiff sought to appeal. I may say that I, too, itch to discuss the merits and, if it were proper, would do so even more in detail. . . ."

Philadelphia Storage Battery is discussed with approval in 17 Cornell Law Quarterly 484, particularly at 479:

To the same effect as the foregoing cases is *Watkins* v. *Rich* 254 Mich. 82 (235 N.W. 845), where the Court stated at 846 (235 N.W.):

> "A provision in a contract for termination at the option of one party is valid. But where the relationship is commercial and does not involve fancy, taste, sensibility, judgment, or other personal features, the option may be exercised only in good faith."

See also Corbin on Contracts, Section 1266.

The case of *Shannon v. Gaar* 233 Iowa 38, (6 N.W. 2d 304), while involving an agreement at will rather than for a

fixed term, is analagous to the case at bar. There the principal terminated the services of a real estate broker shortly before the culmination of the negotiations and sale. The Court held that the broker had performed substantial services and could not be deprived of his commission by the mere termination of the agreement. Here, Vickery transferred all of his patent applications and designs to Fisher, communicated his know-how to Fisher and performed substantial services under the Royalty and Sales Agreements for a period of five years. Fisher's purported termination of the Royalty and Sales Agreements in the face of projections of enormous sales of the products covered thereby over the balance of the ten-year term of the Agreements, upon which Vickery would have earned substantial royalties and commissions, is comparable to the principal's termination of his broker's services in *Shannon* and the result reached in that case should be applicable here.

2.2 The facts and circumstances surrounding Fisher's termination of the Royalty and Sales Agreements (and Fisher's bad faith, lack of justification and unjust enrichment and Vickery's detriment in connection therewith, as to many of which there are genuine factual issues), are set forth in Paragraph 1.3, supra, and the existence of those factual issues precludes the granting of a motion for summary judgment.

3. The District Court's construction of the Royalty and Sales Agreements so as to give Fisher the unilateral option during the last five years of the term to pay or not to pay the specified consideration was erroneous as a matter of law.

3.1 Analysis and Construction of the Royalty and Sales Agreements.

3.11 Paragraphs 3 and 9 of the Royalty Agreement and Paragraph 7 of the Sales Agreement expressly provide for a term of ten years. Paragraph 7 of the Royalty Agreement

provides that if Fisher exercises the right of termination prior to October 1, 1965, Fisher *expressly* shall cease the production and sale of the products covered by the Royalty Agreement. The last paragraph of Paragraph 3 of the Royalty Agreement *expressly* provides that Fisher shall not be obligated to pay royalties to Vickery for products specified therein which are sold on orders accepted by Fisher on or after October 1, 1970. Paragraph 6 of the Royalty Agreement provides for Fisher's "unrestricted" right of termination; it also provides that if Fisher exercises the right of termination "both parties shall be released from all obligations hereunder" except for the obligation of Fisher to pay to Vickery (i) royalties on products which are shipped and billed prior to the date of termination, (ii) royalties on products sold from inventory on hand at the date of termination and shipped at any time thereafter and (iii) the pro-rata portion of the minimum royalty. While the Royalty Agreement *expressly* provides that Fisher shall cease production and sale if it terminates the agreement prior to October 1, 1965 and also *expressly* provides that Fisher can continue to manufacture and sell products after October 1, 1970 without royalty obligation to Vickery, nowhere in the agreement is the *express* provision that Fisher can terminate the agreement at any time after October 1, 1965 (which termination would also terminate the Sales Agreement pursuant to Paragraph 7 thereof) and continue to manufacture and sell products covered thereby without royalty or commission obligations to Vickery. If such an unfair result was intended (which is tantamount to a unilateral option for Fisher to pay or not to pay the specified purchase price for the property Fisher purchased) it certainly would have been set forth in express terms and not left to implication. The clause in Paragraph 6, paraphrased in (ii), above, militates against such a conclusion.

Could it have been intended that upon a termination of the Royalty Agreement by Fisher after October 1, 1965, that Fisher would have to inventory all of the products covered thereby then on hand, segregate the same from Fisher's continuing production, pay royalties to Vickery on the products so segregated (regardless of when they were sold) and not on the continuing production? This conclusion is compelled by the construction placed on the Royalty Agreement by the District Court and, yet, such a construction produces a result which is in conflict with commercial and practical reality and also has no apparent purpose.

The obvious purpose of the termination clause was to permit Fisher to terminate its express obligation to Vickery in Paragraph 4 of the Royalty Agreement to "maintain, during the effective period hereof, an aggressive development, engineering, manufacturing and sales program for ball valves" (and hence discontinue the production and sale of the products covered by the Royalty Agreement) should Fisher deem it unprofitable to continue to pursue that program and, since that decision is a matter of business judgment about which reasonable men can differ, Fisher was given the "unrestricted" right to make that decision. It is hornbook law that an agreement must be construed as a whole to give effect to all of the provisions therein. The foregoing construction is the only one possible which harmonizes the ten-year term of the Agreements and the clause relating to the payment of royalties on inventory on hand at the date of termination with the termination provisions. The foregoing construction also is in harmony with the representation made by Messrs. Fisher, Wolfe and Elfers to Mr. and Mrs. Vickery during the contract negotiations that the only reason Fisher would terminate the agreements would be if Fisher could not manufacture and sell the ball

valves at a profit (Declaration of Alice Vickery R. 253-255; Vickery declaration R. 226, lines 19-22).

On the other hand, the construction placed on the agreements by the District Court not only gives no effect whatsoever to the ten-year term of the Agreements which, obviously, is one of the most important provisions therein, but also results in giving Fisher, by construction of the Agreements, an unfair and unreasonable advantage over Vickery. This is contrary to the established canons of construction. See Williston on Contracts, Section 600, *Harvey Construction Co. v. Parmele* 253 Iowa 731 (113 N.W. 2d 760) and *Freese v. Town of Alburnett* 255 Iowa 1264 (125 N.W. 2d 790).

Also see the following cases which, by construction, limit the exercise of purportedly unrestricted termination clauses so as to achieve fair and reasonable results.

In *Richard Bruce & Co. v. J. Simpson & Co.,* 243 N.Y.S. 2d 503, an underwriter of securities which was obligated, "on a best efforts basis", to sell securities, had an agreement with the issuer which permitted the underwriter "in its absolute discretion" to terminate the agreement if the underwriter "shall determine that market conditions or prospects of the public offering are such as to make it undesirable or inadvisable to continue the public offer." The issuer refused to go forward with the offering and the underwriter sued for breach of the agreement. The issuer made a motion to dismiss on the ground that the agreement was illusory because of the underwriter's right to terminate. The Court denied the motion on the ground that the agreement was not illusory because "the term, 'absolute discretion', must be interpreted in context and means under these circumstances a discretion based upon fair dealing and good faith — a reasonable discretion."

In *Dubois v. Gentry* 182 Tenn. 103 (184 S.W. 2d 369) the Court said:

"Here it is expressly provided that the lessee shall have the right to terminate the lease 'for any reason' other than a wilful refusal to abide by it, or if the buildings are destroyed by fire. We cannot say that it could be terminated for a trivial reason, since in many circumstances such an excuse might amount to nothing more than a wilful act. If, however, the reason for its termination is founded in truth and fair dealing, then it is sufficient to justify the lessee in terminating his contract. Such a reason falls within the express provisions of the contract now before us. The words 'if for any reason', etc., as incorporated in the contract, should be construed to mean 'any good reason or just reason.'"

In *Quick v. Southern Churchman Co.* 171 Va. 403 (199 S.E. 489) the Court construed a provision in a contract which gave either party the right to terminate "for just cause" on 30 days' notice. The Court said "the grounds upon which [exercise of the right to terminate] is based must be reasonable, and there should not be an abuse of the conferred right. It must be a fair or honest cause or reason, regulated by good faith on the part of the party exercising the power. It limits the party to the exercise of good faith, based on just and fair grounds as distinguished from an arbitrary power."

The construction placed on the agreements by the District Court also is in diametric conflict with the covenant of good faith and fair dealing implied by law in every contract.

In 17A C.J.S. Contracts page 284-286 the rule is stated:

"Moreover, in every contract there exists an implied covenant of good faith and fair dealing; and, more specifically, under such rule, the law will imply an agreement to refrain from doing anything which will destroy or injure the other party's right to receive the fruits of the contract."

In addition to the myriad of cases there cited in support of that statement, see also *Franke v. Wiltschek* (2nd Cir.) 209 F.2d 493 at 499, where the Court quotes with approval a statement by the authors of the Restatement of Torts, viz.: "But the tendency of the law, both legislative and common, has been in the direction of enforcing increasingly higher standards of fairness or commercial morality in trade. The tendency still persists."

In commercial transactions, Iowa clearly adheres to the policy expressed in the foregoing citation, as evidenced by its adoption (subsequent to the execution of the Royalty and Sales Agreements) of Sections 1-203 and 2-302 of the Uniform Commercial Code (respectively, 61 G.A.c. 413, Sec. 1203 and Sec. 2302) which provide:

> "Section 1203. Every contract or duty within this code imposes an obligation of good faith in its performance or enforcement."
>
> "Section 2302. (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
>
> (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination."

3.12 The construction placed on the agreements by the District Court—that during the last five years of the term Fisher had, in effect, the unilateral option to pay or not to pay the specified consideration—is so at odds with com-

mercial reality when compared with the construction herein placed on the agreements in Paragraph 3.11, supra, as to inexorably compel the conclusion that the agreements are ambiguous, that parol evidence must be received in aid of the interpretation thereof and that, therefore, summary judgment should not have been granted.

See *Aultman v. Meyers,* 239 Iowa 940 (33 N.W.2d 400) where the court stated at page 405 (33 N.W.2d):

> "The trust agreement was open to different constructions. On the face of the instrument there was some doubt, uncertainty and ambiguity. There was reasonable basis and fair debate as to its meaning on the part in question. It was susceptible to each of the constructions which the opposing parties placed on it. In such a situation it has uniformly been held by the court that not only evidence of the circumstances surrounding the parties and the transaction, and their conduct at the time, is admissible as bearing upon their intentions, but also what they may have said at or before the execution of the instrument which bears upon that intention. Such evidence does not change or contradict the wording of the instrument, but only explains, clarifies or removes any doubts as to its meaning. As said in *Chamberlain v. Brown,* 120 N.W. 334, 338: 'Of course oral testimony cannot be allowed to vary the terms of a written lease, but it is sometimes admissible in support of a contract to show in what manner it was understood by the parties who made it.' In *Seeger v. Manifold,* 231 N.W. 479, 481, the court said: 'It is also a well recognized rule of law that when the terms of a contract are ambiguous, then it is proper to look to the conversations, statements, circumstances, negotiations, and conduct of the parties as an auxiliary to the construction to be placed upon the same.' Like decisions will be found in may other cases, of which we cite the following. [citing 15 Iowa cases]"

4. The District Court abused its discretion by denying Vickery's motion for leave to file an amended complaint to add a second cause of action to his First Amended Complaint for Damages for reformation of the Royalty and Sales Agreements.

4.1 *The Nature of the Proposed Amendment:* The proposed second cause of action (R. 399-401) incorporates by reference all of the allegations in the first cause of action except those in Paragraph IV and adds one new Paragraph. The new paragraph (II) contains allegations concerning the representations made by the officers of Fisher to Mr. and Mrs. Vickery during the contract negotiations that Fisher would not exercise the right of termination unless, in Fisher's judgment, it could not manufacture and sell ball valves at a profit. Comparable allegations were made in Paragraph IV of the original complaint (R. 3) and in Paragraph IV of the First Amended Complaint for Damages (R. 155). The new paragraph then concludes with the allegation that, by the mutual mistake of the parties, the Royalty and Sales Agreements did not completely and accurately express that understanding (R. 400, line 29—R. 401, line 1.

4.2 *Procedural Authorities:*

4.21 The amendment of pleadings is governed procedurally by Rule 15(a), F.R.C.P. which provides in pertinent part:

> "Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires."

4.22 The quoted portion of Rule 15(a) is commented upon in Moore's Federal Practice, Second Edition ("Moore") Section 15.08, at pages 874-875 as follows:

> "Recognizing that the entire spirit of the rules is to the effect that controversies shall be decided on the

merits, the courts have not been hesitant to allow amendments for the purpose of presenting the real issues of the case, where the moving party has not been guilty of bad faith and is not acting for the purpose of delay, the opposing party will not be unduly prejudiced, and the trial of the issues will not be unduly delayed."

Here, Vickery cannot be charged with bad faith nor can he be charged with acting for the purpose of delay because it is to his obvious best interests to have this case decided as promptly as possible. Fisher would not have been prejudiced in any respect by the granting of the motion. The second cause of action in the proposed amended complaint pleads essentially the same facts as are pleaded in the amended complaint now on file. All discovery with respect to that complaint was completed and no new discovery will be required by either party. Accordingly, the trial of the issue would not have been delayed.

4.23 The proposed amendment cannot be objected to on the ground that the proposed second cause of action states a cause of action based upon the legal theory of reformation whereas the legal theory of the amended complaint now on file (which, as pointed out above, is identical to the First Cause of Action in the proposed amended complaint) is based on the legal theory of contract. This is made explicitly clear in Moore, Section 15.08, pages 876-880, as follows:

"Restrictions which state courts—or codes—have imposed upon the allowance of amendments have no place under the Federal Rules. Many jurisdictions, for instance, have followed the rule that an amendment may not 'substantially change' the cause of action or defense, or introduce a different claim or defense. This limitation has not been observed under Rule 15. * * * Thus a complaint in an action under the Jones Act may be amended to bring the action also under the Death on

the High Seas Act; or a plaintiff, ordered to file an amended complaint, may include an additional cause of action arising out of the same transaction, *or may change the claim from one in contract to one for reformation in equity,* or to one in tort. The fact that an amendment involves a departure from the facts previously alleged is no bar to its allowance, since consistency in pleading is not required." (emphasis added)

4.24 The fact that the proposed amendment is offered late in the case is not a ground for denying the motion to amend if the other party will not be prejudiced. See Moore, Section 15.08, pages 901-902 where it is stated:

"It should be particularly noted, however, that while laches and unexcused delay may bar a proposed amendment, the mere fact that the amendment is offered late in the case is not enough to bar it if the other party is not prejudiced. Amendments may be offered at the trial, or even after reversal and remand. In evaluating claims of prejudice, whether claimed by reason of delay or otherwise, the possible prejudice to the moving party if the motion is denied may also be weighed."

As is pointed out above, Fisher would not have been prejudiced by the granting of this motion and Vickery was severely prejudiced by the denial thereof by being denied the opportunity to have the issue of reformation decided on the merits.

4.3 *Substantive Authorities With Respect To Reformation:*

4.31 The following authorities establish the law of Iowa with respect to the reformation of instruments:

Wallace v. Spray 248 Iowa 100 (78 N.W. 2d 406)

"The first prerequisite to plaintiff obtaining reformation of above instrument is the showing by clear and

satisfactory proof the existence of a contract between them, a meeting of the minds, as to what should be the terms of the subsequent written agreement. As will be later shown, there is a sharp conflict in the oral testimony of the two litigants. In such a situation the circumstances surrounding them and the relative reasonableness or unreasonableness of their respective versions properly may be considered and often furnish very satisfactory indication as to where the truth lies."

Wormer v. Gilchrist 210 Iowa 463 (230 N.W. 856)

"Equitable jurisdiction with reference to the reformation of a contract is well defined. If a written contract fails to express the true agreement of the parties thereto, then equity may be invoked, and if invoked will grant relief under proper circumstances without regard to the cause of the failure to express the contract as actually made, 'whether it be from fraud, mistake in the use of language, or any other thing which prevented the expression of the intentions of the parties.' (citing cases) It is said in *Costello v. Stokely Grain Co.* 186 N.W. 842, 843: To authorize a reformation there must be shown—'such a degree of proof as will produce, in an unprejudiced mind, the belief and conviction of the truth of the fact asserted, taking into consideration all the surrounding facts and circumstances.' (citing cases) In cases of this character the so-called parol evidence rule finds no application, and it is competent to show the conversations and the surroundings of the parties to the contract prior to its execution. A contract may be reformed to correct a clearly established mutual mistake, even though the party praying for reformation was guilty in a measure of negligence."

Akkerman v. Gersema .... Iowa .... (149 N.W. 2d 856)

"Of course, the right to reform an instrument is not absolute, but is within the sound direction of the equity

court and depends upon whether the remedy is essential to the ends of justice. *Milligan Co. v. Lott* [263 N.W. 262]. We said therein the facts and circumstances must be such as constitute an effectual appeal to the conscience of the court and prompt it to interfere by reformation to mitigate the rigorous rules of law."

Walnut Street Baptist Church v. Oliphant 257 Iowa 879 (135 N.W. 2d 97)

"If an instrument as written fails to express the true agreement between the parties, equity will grant relief, without regard to the cause of the failure to express the agreement as actually made, whether it is due to fraud, mistake in the use of language, or anything else which prevented the instrument from expressing the true intention of the parties."

Miller v. Martin 246 Iowa 910 (70 N.W. 2d 141)

"However, there is no question but that a court of equity may reform an instrument when it fails to express the true agreement of the parties. Relief may be granted without regard to the cause or reason for failure to express, in the written agreement, the agreement actually made whether due to fraud, mistake in the use of language, or any other thing that prevented the expression of the true agreement. *Coleman v. Coleman* 133 N.W. 755; *Milligan Co. v. Lott* 265 N.W. 262"

To the same effect is *Costello v. Stokely Grain Co.* 193 Iowa 203 (186 N.W. 842).

4.4 *The Facts And Law Establish That Vickery Is Entitled To Reformation:*

Throughout this action—in the original complaint, in the first amended complaint, in the proposed amended complaint, in the depositions of Vickery and his wife and in the Declarations of Vickery and his wife filed in support of the

motion (R. 419; 421-425)—Vickery has consistently stated that during the negotiations which preceded the execution of the Royalty and Sales Agreements, the *only* reason assigned by any representative of Fisher for the inclusion of a termination clause in the Royalty Agreement was to enable Vickery to relieve itself of its continuing obligations in the event it could not manufacture and sell the products covered thereby at a profit.

If Vickery's version of the statements made to him during the negotiating meetings (i.e., that Fisher would terminate the Agreements *only* if the products covered thereby could not be manufactured and sold at a profit) are believed by a court or jury, it is clear that the parties' oral agreement to this term of the contract was restricted to termination for that reason and that reason alone, even assuming that Fisher had other reasons which it did not disclose. See Iowa Code, Section 622.22 which provides:

> "When the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other understood it."

In *Castner v. First National Bank of Anchorage* (9th Cir.) 278 F. 2d 376 at 384 the Court stated:

> "In view of our conclusion that the record tends to show the existence of facts permitting appellant to maintain this action, the Court below should not have entered the summary judgment against the appellant. For where the entire record reveals facts susceptible of inferences that would justify an amendment of the pleadings and save the action, a motion for summary judgment should not be granted, but the party against whom the motion is directed should be afforded an opportunity to amend his faulty pleading. *Kane v.*

Chrysler Corp., D.C. Del. 1948. 80 F. Supp. 360; *Rossiter v. Vogel,* 2 Cir., 1943, 134 F. 2d 908, 912. Accordingly, the judgment will be reversed and appellant permitted to amend her complaint to show, if possible, the facts suggested in her affidavit."

Certainly, the foregoing "reveals facts susceptible of inferences that would justify an amendment of the pleadings" within the meaning of the above quotation from *Castner.*

CONCLUSION

For the reasons stated above, it is respectfully submitted:

1. That this Court should reverse the Order Granting Motion For Summary Judgment made by the District Court and the judgment entered thereon on August 14, 1967 and, in so doing, determine, as a matter of law:

   a. That the Royalty and Sales Agreements imposed a fiduciary and confidential relationship on the parties which precluded the termination thereof by Fisher unless Fisher acted in the utmost good faith and with reasonable justification;

   b. That, in any event, Fisher did not have the right to terminate the Royalty and Sales Agreements unless Fisher acted in good faith and with reasonable justification;

   c. That the termination provisions of the Royalty and Sales Agreements are ambiguous and parol evidence should be received by the District Court in aid of the interpretation thereof.

2. That this Court should reverse the Order made by the District Court made on December 18, 1967 and direct that Vickery be granted leave to file an amended complaint

to add a second cause of action for reformation of the Royalty and Sales Agreements.

Dated: April 25, 1968.

Ehrlich & Allison

By Edward K. Allison
Attorneys for Appellant

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Edward K. Allison
Attorney at Law

Appendix A

AGREEMENT

Agreement, effective as of October 1, 1960, by and between Fisher Governor Company, a corporation, the principal office of which is in Marshalltown, Iowa, (herein called "Fisher") and Edgar Herbert Vickery, whose office address is 610 Sixteenth Street, Oakland, California (herein called "Vickery").

RECITALS

A. Vickery has developed various types of ball valves and related actuators and devices (herein, for convenience, referred to collectively as "ball valves") some of the elements, features and characteristics of which are described in the following applications for United States Letters Patent made by Vickery:

Serial Number	Filing Date	Short Description
614,842	October 9, 1956	Ball valve
677,617	August 12, 1957	Liquid oxygen valve and actuator
749,770	July 21, 1958	Ball valve
812,309	May 11, 1959	Sealed ball valve
39,846	June 30, 1960	Protected ball valve seal,

and the balance of which are described in the engineering drawings described in Schedule A attached hereto. Vickery also is the owner of the following test units:

Two 3″ Aluminum ball valves (BBV-300)
One 3″ Stainless steel ball valve (BBV-300A)
One 3″ Stainless steel Ball valve with actuator (MB-31503-S115),

and miscellaneous jigs, fixtures, cutting tools and parts which are useful in the manufacture of ball valves.

B. Fisher desires (i) to purchase all of Vickery's right, title and interest in and to the patent applications, engi-

neering drawings, test units and miscellaneous equipment described in Paragraph A and (ii) to engage in the business of manufacturing, using and selling the ball valves covered thereby.

The parties, therefore, agree as follows:

1. Vickery—

1.1 hereby sells, assigns, transfers and sets over unto Fisher all of Vickery's right, title and interest in and to the patent applications, engineering drawings, test units and miscellaneous equipment described in Paragraph A; and

1.2 warrants that he owns and has the right to sell the same free and clear of any interest of any third party; and

1.3 agrees forthwith to deliver to Fisher copies of the originals of said patent applications (including all correspondence and documents related thereto) and said engineering drawings, tests units and miscellaneous equipment.

2. Fisher—

2.1 hereby purchases the patent applications, engineeering drawings, test units and miscellaneous equipment described in paragraph A; and

2.2 agree to continue to prosecute, at its expense, each of said patent applications so long as the patent counsel for Fisher believes that the continued prosecution thereof will result in the issuance of a patent; and

2.3 agrees to pay Vickery therefor

2.31 $25,000.00 in cash, promptly after receipt by Fisher of the property to be delivered to it pursuant to Paragraph 1.3 and $75,000.00, in cash on January 15, 1961.

3. As soon as reasonably feasible, after the execution hereof and delivery of the foregoing items unto Fisher, it will proceed to the manufacture and sale of Vickery Ball Valves (or under whatever designa-

tion or name Fisher may see fit), and, during an initial period of ten (10) years beginning on October 1, 1960, subject to termination prior to the end of said period as hereinafter set forth, Fisher shall pay unto Vickery, his heirs, assigns or designees, royalties upon sales of said ball valves, as follows:

Two percent (2%) of all net annual sales in excess of $500,000 and not in excess of $1,500,000,

One and a half per cent (1½%) of all net annual sales in excess of $1,500,000 and not in excess of $2,500,000,

One percent (1%) of all net annual sales in excess of $2,500,000.

with the further agreement that, during the first five years of said ten year period, or during such lesser period as this contract may be in force; Fisher shall pay no less than $20,000.00 of royalties per year, in any event; and, thereafter, said minimum shall not apply.

"Net annual sales," for the purposes hereof, is defined to mean the aggregate of the sale prices of the products specified herein (less sales commissions paid on said sales, but inclusive of cash and prompt payment discounts allowed) billed by Fisher, its successors, subsidiaries and licensees, at any time for said products which are shipped (i) during the contract year ending on the anniversary of the effective date of this agreement and during each succeeding contract year to and including the contract year ending on October 1, 1970, and (ii) during each contract year after October 1, 1970 on orders which are accepted by Fisher prior to October 1, 1970.

Royalty payments shall be made within sixty (60) days after the end of each quarter calendar year. Since the exact amount due cannot be known except at the end of each full year of the period of this agreement, Fisher will not be held to pay more than $5,000.00

in royalties at the end of each quarter calendar year during the first five years of this contract with final adjustment to be made at the end of each year; or, during the remaining period of this contract, more than one-fourth of estimated annual royalties at the end of each quarter calendar year, Fisher to have the right to make such estimates and to provide a reasonable margin of safety for errors in estimates; again, with final adjustment to be made at the end of each year of this agreement.

At the end of each year of this contract, with each final royalty payment for the preceding year, Fisher shall furnish to Vickery, or his successors in interest, a brief statement showing the basis for the royalty payments for such preceding year. Vickery, or a representative chosen by him, shall have the right, at all reasonable times and, in such manner as not unduly to inconvenience Fisher, to inspect and check the sales records of Fisher in respect to the sale of ball valves for the purpose of verifying the amount of royalty payments, or ascertaining royalties due.

Fisher shall not be obligated to make any royalty payments to Vickery for products specified herein which are sold on orders accepted by Fisher on or after October 1, 1970.

4. Fisher agrees that after the delivery to it of the property herein specified it will promptly initiate and thereafter maintain, during the effective period hereof, an aggressive development, engineering, manufacturing and sales program for ball valves.

5. In order to acquaint Fisher personnel with the highly technical and intricate techniques involved in the design and manufacturing of ball valves and to assist in the implementation of the ball valve program, Vickery agrees that for the period during which royalties are payable hereunder he will, without further consideration:

Serve as a consultant to Fisher in the development, engineering, manufacturing and sale of ball

valves and to devote as much time thereto as Fisher may require.

Attempt diligently and continuously to develop improvements in respect of ball valves, disclose all of such improvements to Fisher promptly after Vickery conceives of the same, and, if directed by Fisher and at Fisher's expense, make application for letters patent on any or all of such improvements and assign the same to Fisher.

Refrain from any act or conduct whatsoever which, directly or indirectly, involves competition or interference with Fisher in the development, engineering, manufacturing or sale of ball valves. If Fisher does not exercise its right to terminate this agreement pursuant to the terms hereof, this obligation shall continue indefinitely.

6. Fisher has the unrestricted right to terminate this agreement at any time by giving Vickery at least sixty (60) days prior written notice by U.S. Registered Mail addressed to Vickery at his last known address. If Fisher exercises its right of termination within the period and in the manner specified, this agreement shall terminate sixty (60) days after the date on which such notice is mailed or on the date specified in the notice, whichever is later, without further act of either party and both parties shall be released from all further obligations hereunder, excepting as follows:

Fisher shall continue to be obligated to:

pay to Vickery within ninety (90) days after the date of termination all royalties which may be due on products specified in Paragraph 3 which are shipped and billed on or prior to the date of termination; and

pay to Vickery within ninety (90) days after the date of shipment all royalties which may be due on products specified in Paragraph 3 which are sold from inventory on hand at the date of termination

and shipped or accepted for shipment at any time thereafter; and

pay to Vickery within ninety (90) days after the date of termination the proportion of any installment of minimum royalties specified in Paragraph 3 which would be due at the end of the quarter annual year during which this agreement terminates which the number of days in that quarter annual year prior to the date of termination bears to the total number of days in that quarter annual year, but thereafter no further minimum royalties shall be payable by Fisher.

7. In the event Fisher exercises the right of termination prior to October 1, 1965, then and in such event Fisher shall be obligated to:

transfer to Vickery, promptly after the date of termination, all of Fisher's right, title and interest in and to all physical property delivered to Fisher pursuant to Paragraph 1.3 which then is in existence, together with all designs and data in its possession relating to ball valves, free and clear of any interest of any third party and to deliver the same to Vickery; and

assign and deliver to Vickery, promptly after the date of termination, all patent applications and patents which may have been issued thereon which (i) are assigned to Fisher pursuant hereto and (ii) may be assigned to Fisher pursuant to the terms hereof; and

forthwith permanently cease the production and sale of any of the products specified in the above Paragraphs, except such products as Fisher may have in inventory on hand at the date of termination.

8. In the event of the termination of this agreement Vickery shall be entitled to retain all sums of money theretofore paid to him under the terms hereof.

9. For the sole purpose of protecting the right of Vickery to receive the royalties provided for herein and without intending otherwise to restrict the absolute ownership by Fisher of the property transferred to it and which may be transferred to it pursuant hereto, Fisher agrees that it will not prior to October 1, 1970, without the prior written consent of Vickery, sell, transfer, license or otherwise dispose of any of its rights in any of said property; provided, that nothing herein shall prohibit such a sale, transfer, license or other disposition by Fisher to a wholly-owned subsidiary of Fisher, a successor of Fisher by merger or consolidation, or to an individual or entity which is a licensee of Fisher under a license agreement which is presently in effect; provided further, that the subsidiary or successor shall assume the obligations of Fisher under this agreement and, in the first such instance, Fisher shall guarantee the performance of said obligations by the subsidiary. In the event of an authorized sale, transfer, license or other disposition, the subsidiary or successor or other third party shall not have the right to make any further sale, transfer, license or disposition without the prior written consent of Vickery.

10. Vickery shall bear full risk and responsibility for defending any patent infringement suit or suits brought against Fisher and Vickery further agrees to indemnify and hold Fisher harmless against any damages, loss or expense sustained by Fisher as a result of any infringement suit whatever. Vickery's liability hereunder shall be limited to the amount of any royalties which may be due and owing him at the time of the institution of such suit or suits.

11. In the event Vickery should die during the term of this agreement, his death shall not terminate or otherwise affect Fisher's obligations hereunder and all sums of money which thereafter may become due

to Vickery hereunder and all property which thereafter Fisher may be obligated to transfer and deliver to Vickery hereunder shall be paid, transferred and delivered to Vickery's heirs, or to the person or persons entitled thereto under any decree of distribution entered in the probate administration of Vickery's estate. Payment transfer and delivery made by Fisher to said heirs or person or persons shall completely absolve Fisher from any further obligation with respect thereto. If, after Vickery's death, Fisher elects to exercise the right to terminate this agreement, the notice of termination shall be effective if it is mailed by U. S. Registered Mail addressed to Vickery at his last known address or, if the executor, administrator or other personal representative of Vickery's estate or Vickery's heirs gives written notice to Fisher of another address to which such notice of termination should be sent, then to that address.

12. In the event that Fisher—

fails to perform any of its obligations hereunder and fails to remedy the same within sixty (60) days (fifteen (15) days in the case of a failure to pay any sum which is due to Vickery hereunder) after receipt by Fisher of written notice thereof from Vickery; or

voluntarily files a petition in bankruptcy or for reorganization or to effect a plan or other arrangement with creditors under any bankruptcy or similar law or makes an assignment for the benefit of its creditors; or if a petition in involuntary bankruptcy is filed against Fisher or if any other type of proceeding for the benefit of creditors is commenced against Fisher or if a receiver or trustee is appointed to take charge of all or a substantial portion of the assets of Fisher and if such last mentioned petition or proceeding is not dismissed or if such receiver or trustee is not discharged

within sixty (60) days after filing or appointment, respectively, then,

Vickery shall have the right to terminate this agreement by written notice to Fisher, but such termination shall not affect the obligations of Fisher. The exercise of the rights granted to Vickery in this Paragraph shall not preclude Vickery from asserting any other legal rights which Vickery may have under the circumstances.

13. With respect hereto Vickery shall be an independent contractor and it is expressly understood that Vickery is not an employee of Fisher.

14. The validity of this agreement shall be determined by and this agreement shall be construed in accordance with the laws of the State of Iowa.

15. This agreement (i) shall be binding upon and inure to the benefit of the successors and assigns of Fisher (subject to the provisions hereof) and (ii) shall be binding upon and inure to the benefit of the personal representative, heirs, successors and assigns of Vickery.

In Witness Whereof, Fisher has caused this agreement to be subscribed by its duly authorized officers and Vickery has hereunto set his hand on the respective dates set opposite their names, but effective as of October 1, 1960.

Fisher Governor Company

By /s/ J. W. Fisher
Its President

Attest: /s/ G. Butler
Its Secretary

November 10, 1960

/s/ Edgar Herbert Vickery
Edgar Herbert Vickery

November 5, 1960

CONSENT, WAIVER AND AGREEMENT

For the purpose of signifying her acquiescence to all of the foregoing, and waiving any rights which she has, or may have in the premises, arising out of the community property laws of the State of California, and as an inducement to Fisher, ALICE M. VICKERY, wife of Vickery, does hereby join in the execution of this agreement; and she agrees that Fisher may deal in this matter, in whatever respect, solely with Vickery and make all payments due hereunder to him alone, or to his designees or successors in interest, without reference to her.

Dated: November 5, 1960

/s/ ALICE M. VICKERY
Alice M. Vickery

Appendix B

AGREEMENT

Agreement, effective as of October 1, 1960, by and between Fisher Governor Company, a corporation, the principal office of which is at Marshalltown, Iowa, (herein called "Fisher") and Edgar Herbert Vickery, whose office address is 610 Sixteenth Street, Oakland, California, (herein called "Vickery").

The parties agree as follows:

1. Fisher hereby grants to Vickery the right to sell and service Fisher manufactured ball valves with the exclusive right to sell such ball valves to government end-users in the United States of America.

1.1 A "Ball Valve," for the purposes, hereof, is defined to mean any of the products specified in the separate Agreement, effective as of October 1, 1960, between the parties hereto, including replacement parts therefor.

1.2 A "government end-user," for the purposes hereof, is defined to mean—

1.21 Any agency or department of the government of the United States of America, or

1.22 Any contractor of any such agency or department, or

1.23 Any known subcontractor of any such contractor.

1.3 "Government use," for the purposes hereof, is defined to mean the application of ball valves in—

1.31 Aircraft, spacecraft and missile systems (including test, facility, transport, support and launching systems related thereto); or

1.32 naval vessel, submarine and other maritime systems; or

1.33 atomic energy research, test and experimental systems; or

1.34 military equipment systems.

2. Unless otherwise agreed in writing by the parties, Vickery's representation hereunder is limited to the sale of ball valves to government end-users for governmental use.

3. Fisher will pay commissions or extend a preferential discount to Vickery on prices f.o.b. Marshalltown, Iowa, as hereinafter provided:

(a) On standard published price items sold at Consumer's Net 15%

(b) On standard items sold at 10% beyond Consumers Net 10%

(c) On items sold at 15% or 20% beyond Consumer's Net 5%

(d) On special items not carried as standard priced items, it is the intent to build into the selling price a commission or earning power of 15% on the sales or contract price. If, because of competitive or contract requirements, it is not possible to include a 15% sales commission, such contracts, pricing or quotations for sale shall carry a lesser amount of commission. Such amount as may be available will be determined by Fisher which will advise Vickery during the course of arriving at the price of items to be quoted or sold.

(e) Replacement Parts — On standard equipment when sold at Consumer's Net........ 15%

(f) Replacement Parts — On standard equipment when sold at Consumer's Net less 10%.. 10%

(g) Commissions will be shown on credit memorandums at the time of invoicing. Payment will be made on the 15th day of the second month following the month of invoicing. Commissions paid on any uncollectible account will be debited to Vickery and other representatives who may have participated in the original commission payment. Any billing to representatives will be payable on or before the 10th proximo.

(h) Consumers' net is the published list price less discount shown in the current discount sheets.

4. Commission as described under Paragraph 3 will be paid Vickery, except if in the course of busines it is desirable and necessary to cooperate with, enlist the aid of or work with (in sales and service) other sales representative of Fisher to effectuate a particular authorized sale then the commission will be subject to final equitable apportionment between Vickery and such other Fisher representative by Fisher and will be divided on the following basis:

(1) Purchase Credit — ¼ of assignable commission. (Purchase Credit is defined as that portion of credit due to a representative for work in aiding the procurement of an order, when such order is placed in that representative's territory).

(2) Engineering — Product Acceptance or Engineering Design Credit — ½ of assignable commission.

Engineering Credit as assignable under this classification shall take into consideration the following phases of work on the part of sales office and representative.

(a) Writing of original specifications to include Fisher equipment.

(b) Detail engineering work with contracting engineers or engineer,

(c) Product Acceptance of, or request for Fisher products by ultimate user

(The above credits may be apportioned between two or more offices based upon circumstances affecting the orders or material concerned on the specific contract in question. Such distribution is to be determined by Fisher).

(3) Territory Destination Credit — ¼ of Assignable Commission. Territorial credit is that portion of a credit which is due to Vickery or other Fisher representative into whose territory the equipment is shipped or installed. The credit entails the responsibility of servicing customer or user at point of installation, including service to equipment as may be required.

(4) Fisher reserves the right, in unusual cases, to justly apportion or re-apportion the division of commission.

5. Payments of commission are subject to the following:

(A) Commissions previously paid for sales during the effective period of this Agreement on equipment returned within one year after shipment, shall be refunded by Vickery, as provided herein.

(B) No commission will be payable if Vickery's account with Fisher is past due.

(C) In the event this Agreement is terminated, orders received from and through Vickery will be accrued to his account up to termination date, except that:

  (1) Shipments made within 60 days after termination date will be subject to one-half of normal commission.

  (2) Vickery waives all commission on shipments made later than 60 days after termination.

(D) In the event this Agreement is terminated 50% of the commissions becoming due and payable after the date of termination will be held for a period of 1 year after such date, for the purpose of protecting Fisher on returned equipment and uncollectible accounts.

6. Vickery agrees:

(A) To employ sufficient, competent assistance for sales, engineering and service, in the above described territory,

(B) To endeavor to maintain published resale prices,

(C) To quote preferential discounts only as recommended by Fisher,

(D) To abide by such rules, regulations or instructions as may be outlined by Fisher,

(E) To hold in strict confidence, sales data, sales policies, engineering specifications and all other confidential information of like nature,

(F) To refrain from selling or offering to sell competitive equipment of any person, firm or corporation, during the term of this Agreement, either directly or indirectly, though Vickery may represent other manufacturers of non-competing equipment with the written approval of Fisher,

(G) To vest title to all sales data, literature, blueprints, copies of orders, customer correspondence and the like in the name of Fisher and to deliver all such items to Fisher in the event this Agreement is terminated,

(H) To make no agreement or contracts purporting to bind Fisher, it being specifically understood and agreed that Vickery is not granted authority to bind Fisher in any manner whatsoever, and that all orders obtained by Vickery for the products sold by Fisher are subject to acceptance of Fisher at its office in Marshalltown, Iowa.

7. This Agreement shall begin on October 1, 1960, and it is the intent of the parties hereto that it shall be for a ten (10) year period to run coincidentally with the royalty agreement executed by the parties hereto on the date hereof but further subject to cancellation as set forth below.

Since all other Fisher sales agreements are currently reviewed and renewed annually, it is the intent of this agreement that it be subject to such annual review and subject to negotiation between the parties, should business conditions warrant such review and negotiation.

In the event of cancellation of the aforesaid royalty agreement between the parties, this Agreement will be cancelled automatically.

This Agreement is entered into in good faith by the parties hereto and, in the event Vickery does not diligently, faithfully and properly perform the duties incumbent upon him as an exclusive Engineering, Selling and Servicing Representative, Fisher may cancel this Agreement upon sixty (60) days written notice to Vickery. Whether Vickery is diligently, faithfully and properly performing his duties as an exclusive representative shall be determined by Fisher, not arbitrarily but in the exercise of reasonable discretion and in pursuance of the good faith hereinabove mentioned.

In Witness Whereof, Fisher has caused its name to be hereunto subscribed, by its duly authorized officer, and Vickery has hereunto set his hand and seal, all on the day and year first above written.

Fisher Governor Company

By /s/ J. W. Fisher
President.

/s/ Edgar Herbert Vickery

Appendix C

Excerpt from deposition of William Fisher, President of Fisher Governor Company, taken on February 7, 1966, approximately four months after the date of the letter of termination (page 89, line 7—page 98, line 15):

"Q. I will now show you a letter [the letter of termination] from Cartwright, Druker, Ryden and Fagg, by Mr. Ryden to Mr. Vickery dated October 2, 1965. Did you direct Mr. Ryden to write that letter, Mr. Fisher?

A. I was aware of the request to write the letter.

Q. Who made the decision to terminate the contract?

A. Fisher Governor's Company management of which I am a part.

Q. Who would that be?

A. Who called and asked him to write the letter, I don't remember.

Q. When you said Fisher Governor Company management, that consists of a body.

A. Yes, it does. You know who they are.

Q. I would like—

A. The officers of the Company.

Q. The officers of the Company, which would be—

A. Mr. Brockett, Mr. Galvin [Fisher's Executive Vice-President] and I, at least.

Q. Three of you?

A. At least.

Q. Did you discuss the termination with anyone else?

A. It seems to me as Ray was involved.

Q. Ray Engle? [He testified that he was not consulted, see paragraph 1.37 (b)]

A. It would have been Ray Engle if there would have been anyone else.

Q. When was the decision made to terminate the contract?

A. At that time.

Q. In October?

A. On October what, 2nd?

Q. Well, was the decision made on the day this letter was written?

A. It was made approximately that time.

Q. Yes. I understand you and Mr. Galvin were in Europe at that time.

A. We were.

Q. As I understand, Mr. Brockett was apparently in on the discussion and if so, this was by long distance telephone conversation, I assume?

A. The decision was reached at approximately the time of the letter.

Q. If you and Mr. Galvin were in Europe and Mr. Brockett was consulted, obviously—

A. It was a mutual decision. I didn't make the telephone call from Europe to Mr. Ryden, if that is what you mean.

Q. I am trying to determine in the decision which led up to the termination I understand the people who participated in that were you, Mr. Galvin and Mr. Brockett and perhaps Ray Engle. If you and Mr. Galvin were in Europe and Mr. Brockett participated in the decision, how did the two of you communicate?

A. I don't remember. Shall I ask?

Q. Well, if you have no recollection about it—

A. Well, I don't remember whether we talked about that on the telephone or not, to tell you the truth.

Mr. Kearney: I gather you had a continuing communication with the factory while you were away.

Witness: Frequently.

Q. You didn't write any letters to Mr. Brockett and Brockett write back to you concerning the termination, I assume, or did he?

A. At this point we had just left and I don't recall that there had been any communication of that nature. I think Mr. Brockett — you were asking me to assume. I can't do it because I wasn't here on that day.

Q. In any event the termination of the contract had your approval and authorization?

A. Yes, it did.

Q. It was made on or about the date of this letter?

A. It must have been.

Q. The decision was made or wasn't made two years prior?

A. No, it wasn't.

Q. It was made about the same time?

A. Right.

Q. I assume when you and Mr. Galvin and Mr. Brockett were discussing this termination you were aware that the termination of the royalty contract automatically terminated the sales contract, isn't that correct?

A. That is correct.

* * *

Q. Why was this decision to cancel the contract made, what was your reason for terminating the contract?

A. Well, we felt the original intents as they were set forth had long since diminished.

Q. What do you mean by that?

A. Disappeared, practically. You asked me early and you know the answers. We had no further instructions, directions or participation by Mr. Vickery and had not had for some time.

Q. Had you requested any?

A. Had I?

Q. Yes.

A. I had not.

Q. Did you direct anyone to request his participation?

A. There was correspondence, I believe, sir, but I was not part of the correspondence.

Q. Who in Fisher Governor Company would have initiated that correspondence, if you know?

A. Any one of the individuals who are involved might have.

Q. Well, who?

Mr. Kearney: Your question is a little bit leading in that you assume that Fisher Governor had to request Mr. Vickery to participate when he has an affirmative duty under the contract to provide additional patents and so on.

A. Anyway that is the way we interpreted it, sir.

Q. Did anyone in the Fisher management to your knowledge ever complain to Mr. Vickery that he was not living up to his side of the bargain under these contracts?

A. Did they complain to him?

Q. Yes.

A. We discussed it that he had not.

Q. Who is we?

A. Mr. Brockett and I.

Q. What specifically didn't he do that prompted this termination?

A. He didn't participate.

Q. In what sense?

A. All the original intents.

Q. There must have been some specific reason.

A. Those are.

Q. He didn't do this or some other thing?

A. He hadn't done them for some time.

Q. Had anyone requested him to do anything?

A. I assume that was part of our bargain that he proffer and pursue it himself.

Q. I want to ask you this question again. To your knowledge did either you or anyone else—

A. I did not.

Q. In Fisher Governor Company complain to Mr. Vickery that he was not offering advice or doing anything else that he was obligated to under the contract?

A. I did not.

Q. Do you know of anyone else who did?

A. Not from first hand experience, I do not.

Q. You stated that Mr. Brockett had some complaints about Mr. Vickery's performance under the contract. What did Mr. Brockett say to you in the way of these complaints?

A. The same thing I just said to you.

Q. In those terms?

A. Do you want me to quote him verbatim?

Q. If you can.

A. I can't.

Q. Give me the substance of it.

A. I did.

Mr. Kearney: I was making a point of distinction. As I gather from Mr. Fisher's answers at the end of this period they reappraised what contribution Mr. Vickery was making rather than specifically requesting. They evaluated his overall performance.

Q. Did anyone else other than Mr. Brockett complain to you about Mr. Vickery's lack of performance?

A. Well, Mr. Allison, my contact is with Mr. Brockett almost altogether.

Q. You didn't talk to Ray Engle?

A. About what?

Q. About Mr. Vickery's performance or lack of it.

A. Yes, but not to the extent that Mr. Brockett and I did discuss it.

Q. Mr. Brockett is Vice President of the sales, is he not?

A. Yes, he is, with direct and frequent contact with Mr. Engle.

Q. Yes. Did you discuss this with Mr. Engle?

A. Briefly.

Q. Mr. Vickery's lack of performance?

A. Yes, sir.

Q. What did Mr. Engle say?

A. Same thing.

Q. Can you give me the substance of what he said?

A. I wouldn't like to quote verbatim.

Q. Could you —

A. The substance is the same.

Q. What is that?

A. Lack of interest, participation and also a lack—by the way a lack of sales which constitutes another business reason of the governmental ball valve.

Q. A lack of sales?

A. Well, I think there was a lack of sales.

Q. You were making a profit on the sales that were made, however?

A. You said so.

Q. Isn't that a fact?

A. I don't know. I told you that before.

Q. Well Mr. Fisher, you were aware, were you not, that there was a profit being made, without tying you to specific numbers? You were aware in general at the time you made the decision to cancel this contract of that?

A. That there was a profit being made?

Q. That there was a profit being made.

A. I don't recall, no, sir.

Q. You had frequent conferences with Mr. Brockett, didn't you?

A. On that particular subject we had some conferences on it.

Q. Didn't he tell you that there was a profit being made?

A. I just told you I don't remember.

Q. Well, to summarize this then, and I would like to have you listen to this summary carefully, the reason for you terminating this contract was because Mr. Vickery didn't show any interest in this program and didn't participate in it, is that correct?

A. That is correct.

Mr. Kearney: And not making any contributions. He listed that.

Q. And not making contributions?

A. He was not.

Mr. Kearney: And lack of —

A. And lack of sales.

Mr. Allison: Just a minute, Counsel.

Q. And a lack of sales in the governmental ball sales program?

A. Yes sir.

Q. Were there any other reasons?

A. Not that I can recall.

Q. Do you think there were any other reasons?

A. No, sir, I don't. I think those are sufficient, by the way.

Q. There was no prior notice to Mr. Vickery of your intention to cancel this contract, was there?

A. Well, I wouldn't think so.

Q. As a matter of fact was there?

A. I don't think so."

Appendix D

Excerpt from deposition of Glenn Brockett, Vice Presi-ent for Sales of Fisher Governor Company, taken on Feb-ruary 9, 1966, approximately four months after the date of he letter of termination (page 30, line 19—page 34, line 9):

"Q. Now, Mr. Brockett, you were present during the time that Mr. Fisher gave his deposition, were you not?

A. Yes, sir.

Q. You heard him testify that he and Millard Galvin [Fisher's Executive Vice President] consulted with you with respect to the proposed cancellation of the Vickery contract, is that correct?

A. Yes, sir.

Q. And I take it that was a true statement, accurate statement?

A. Yes.

Q. What was the subject of that consultation, or whatever you want to call it?

A. Well, we discussed, of course, whether or not we should cancel it, the contract.

Q. Where were the three parties at that time? I understand Mr. Galvin and Mr. Fisher were in Europe.

Mr. Kearney: You are assuming something.

Q. Would you tell me?

A. Do you want me to tell you what actually happened?

Q. Please.

A. Mr. Fisher did not remember correctly as to these dates and what actually happened. This conversation, I believe, took place in July, in late July.

Q. 1965?

A. '65, yes.

Q. Go on.

A. It was prompted by the reminder from Mr. Walker Allen who is custodian of our contract files that the time of termination of the contract if we wanted to terminate the first five years was approaching. It was his duty to review all contracts periodically and take any action that would be necessary or remind others to do so. So he reminded Mr. Fisher and Mr. Galvin, I presume, that the time was now if we wanted to do it. So Mr. Fisher and Mr. Galvin, and, I believe, Mr. Walker Allen, probably discussed whether or not it would be to Fisher's best advantage to cancel the contract or let it continue. *It was the consensus of opinion that it would be to the best advantage of Fisher Governor Company to cancel the contract.* [Emphasis Added]

Mr. Walker Allen was instructed to discuss this with the attorneys, which he did. They recommended that it not be cancelled in anticipation of the sixty day requirement but wait until the actual date or later of the termination date and then cancel it, making the cancellation effective sixty days after that.

Q. What was the purpose of that recommendation?

Mr. Ryden: Just a minute.

Mr. Kearney: I don't want —

The Witness: That is something I would not know. That was the attorney's opinion, not mine.

Q. I assume that you and Mr. Galvin and Mr. Fisher were all in the same room?

A. Yes.

Q. Tell me what was said by each of the parties to the best of your recollection.

A. I believe that I advised them that in my opinion the volume that we would get in the future based on the actual past history of the deterioration of the market for these types of valves and the fact that Mr. Vickery himself had told me that he didn't anticipate any major use or any incoming large orders as a result of the construction of these new test stands that probably the volume would not be real substantial in the future and that since we were no longer getting any technical help from Mr. Vickery I didn't see that he was performing any useful service to us other than as our sales representative and I could see no reason why we should continue with the royalty contract.

Q. Are you aware of the terms or were you at that time aware of the terms of the royalty contract?

A. Yes, sir.

Q. You were aware that after the first five years there was no longer a minimum royalty payable?

A. Yes, sir.

Q. So if there was nothing sold there was nothing due him, isn't that correct?

A. Yes, sir.

Q. What did Mr. Galvin have to say about this?

A. I don't know that he expressed any opinions to the contrary. I don't remember exactly what either one of them said.

Q. Do you recall what Mr. Fisher said?

A. Mr. Fisher agreed with me entirely and thought this is what we should do.

Q. Would it be a fair statement to say then that the contract was cancelled on your recommendation?

A. I don't know that I would say that exactly. Mr. Fisher was the only one of us who had the authority to tell that it be cancelled. However, I did recommend to Mr. Fisher that it be cancelled and Mr. Fisher was the one."